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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

ALBERT J. VLASAK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals for the Eighth Judicial District, Ohio, Cuyahoga County.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Judicial District, Ohio, Cuyahoga County, entered in the above entitled case on November 23, 1966.

OPINIONS BELOW.

Petitioner was convicted by the Court of Common Pleas for Cuyahoga County, and that conviction was affirmed by the Court of Appeals for the Eighth Judicial District of Ohio, Cuyahoga County. The Supreme Court of Ohio denied a timely request for discretionary review and denied a subsequent timely request for rehearing. No opinions were written by any of the Courts below. The verdict and the Journal Entries of judgment below are set forth in the Appendix hereto at pp. 10-12.

JURISDICTION.

The judgment of the Court of Appeals for the Eighth Judicial District of Ohio was entered on November 23, 1966. Following the decision by the Supreme Court of Ohio to deny the timely application for discretionary review, the Supreme Court of Ohio overruled a timely motion for rehearing on April 12, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

QUESTIONS PRESENTED.

1. Whether the Ohio "Conflict of Interest" criminal statute creates an unreasonable classification and the denial of equal protection of the laws, by excluding from its application a governmental employee who also owns less than five per cent of the corporate stock of a business contracting with that governmental unit, while including in its application a governmental employee who is a mere part-time employee of a mere sub-contractor of a corporate contractor dealing with that governmental unit.

2. Whether the conviction of the petitioner under the Ohio "Conflict of Interest" criminal statute constitutes a denial of due process on the grounds that the statute is too vague for rational application, where the statute imposes criminal sanctions on a governmental employee who is "interested in a contract" between that governmental unit and a private business.

3. Whether petitioner was denied a fair trial and procedural due process where the state was permitted over objection to argue new issues and subjects in the closing phases of its summation, which new subjects and issues had not been raised by the state in the opening portions of its summation or by defendant's counsel in his summation, and where defendant's counsel was denied an opportunity to rebut the state's argument as to these issues and contentions.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

The language of the Fourteenth Amendment to the United States Constitution and the provisions of Ohio Revised Code §§ 2919.08 and 2919.11 are printed in the Appendix to this brief at pp. 9-10.

STATEMENT.

Albert J. Vlasak was the President of his local School Board. In addition, he maintained his regular full-time employment with a structural steel company and occasional part-time employment as an engineer with various contracting companies, including W. E. Cotleur Company (R. 545). The School Board had entered into a contract with a nearby landowner for the purchase of property which would be used to expand the existing high school premises. One of the terms of the contract between the School Board and the landowner required the landowner to improve the property with certain fill work. Several months after the contract between the landowner and the School Board had been arranged, the landowner's sub-contractor for doing the fill work went out of business, leaving the fill work uncompleted (R. 203-05).

Thereafter, the principal officer of the Cotleur Company (an occasional part-time employer of Albert Vlasak) asked Vlasak to be introduced to the landowner, with the hope that the Cotleur Company could obtain a contract with the landowner to complete the required fill work (R. 212). Vlasak did in fact arrange for those two men to meet (R. 296-97), and the landowner did in fact hire the Cotleur Company as a substitute sub-contractor to complete the necessary fill work. Mr. Vlasak testified without any contradiction by any witness that the reason why he introduced these two persons was to assist the School

Board in getting the land acquisition project completed, since that project had been stalled by the inability of the landowner to complete the fill work (R. 602-03).

Some time later the Cotleur official told Vlasak that he would pay him One Thousand Dollars ($1,000.00) if the Cotleur Company did obtain the sub-contract with the landowner, but there was no further participation by Vlasak in the sub-contract negotiations between the Cotleur Company and the landowner (R. 218). In those negotiations the landowner discovered that the fill job was substantially greater than the School Board had originally represented, so he obtained a modification of the sale contract for greater compensation. In a separate taxpayer's action, challenging that contract modification, the Ohio courts held that the modification was entirely appropriate and equitably necessary. After the Cotleur Company had completed the fill work, and had been paid, it did in fact make a payment of Two Thousand Dollars ($2,000.00) to Albert Vlasak. While the prosecution argued that some part of that payment was related to the introduction by Vlasak to the landowner, the amount was based on the bill submitted by Vlasak to Cotleur for part-time engineering services which he had in fact performed at a specified hourly rate (R. 299, 605-06).

Vlasak was indicted on counts of bribery and violation of the Conflict of Interest Law (Ohio Revised Code § 2919.08). At the trial, at the conclusion of the prosecutor's case, the Court directed a verdict for the defendant on the bribery charge and dismissed that count. The case was submitted to the jury on the sole charge of violation of the Conflict of Interest Statute. As the Ohio Courts have interpreted that Statute in this case, there is no need to show any intention of the governmental employee to defraud his governmental unit or any intention by that

governmental employee to participate in any conspiracy to defraud the governmental unit. Therefore, despite the requests by defense counsel that the jury be charged on issues of fraud, motive, or intent, the trial court refused to charge on any of those issues (R. 822), holding that the jury could find that the defendant was "interested" in a contract with his School Board, without any finding that he intended to defraud the School Board or to conspire with others for that purpose. The defendant was convicted, and his conviction was affirmed.

During the final stages of the trial, the prosecutor was permitted to argue in the closing portion of his summation on subjects and issues that had not been raised in the opening portion of the State's summation nor in the summation by defendant's counsel (R. 788-812). Thus, defendant's counsel was deprived of any opportunity to rebut those arguments and contentions, even though he objected to permitting such argument before it occurred (R. 787) and requested an opportunity to rebut such argument when the State completed its summation.

REASONS FOR GRANTING THE WRIT.

1. The State has never contended that the defendant was a shareholder of the corporate landowner which had a contract to sell the land in question to the School Board. The state has never contended that the defendant was an employee of that landowner. Under the unequivocal provisions of Ohio Revised Code § 2919.11, the defendant could avoid conviction in violation of the Conflict of Interest Law if he were a minor shareholder (owning less than 5 per cent of the stock) of the corporate landowner which had the *direct* contractual relationship with the School Board. However, the State has established in this case that the defendant's position as a *part-time employee*

of a mere sub-contractor, with whom the School Board had no direct dealings in this matter, serves as a basis for his conviction. Thus, the Ohio Statute has been interpreted in this case as subjecting a School Board member to criminal responsibility by reason of his employment by a sub-contractor with whom the School Board had no dealings on the project involved, while excusing the class of persons in a much closer relationship between the governmental unit which employs them and the business with which that governmental unit may be dealing. Such a classification is arbitrary, unreasonable, and capricious. Its effect is to deny this defendant equal protection of the laws, since he is held responsible for conduct in circumstances where employees or even minor stockholders of the business enter directly into a contract with his School Board would be exonerated. Cf. *Smith v. Cahoon*, 283 U. S. 553 (1931); *Baxstrom v. Herold*, 383 U. S. 107 (1966).

2. One of the explanations for the extraordinary result which has occurred in this case is the vague standard purportedly established by this Criminal Statute. Under the Ohio Statute, a person is guilty of violating the Conflict of Interest Law, if he is "interested in a contract" between his governmental employer and a private business. The trial judge's attempt to define the phrase "interested in," as part of his charge to the jury, is set forth in the Appendix at p. 12. However, the term "interested in" is so vague and indefinite as to prevent any reasonable application. Cf. *Lanzetta v. New Jersey*, 306 U. S. 451 (1939); *Ashton v. Kentucky*, 384 U. S. 195 (1966). Perhaps because of the somewhat peculiar language of this Statute, its use as a basis for prosecution prior to the present case was the subject of historical interest only. Prior to the present case, the last reported decision dealing with a prosecution under this Statute was in 1889, and

we have been unable to discover any reported judicial interpretation of the exclusion section (Revised Code § 2919.-11) in any Ohio Court prior to this case.

3. The elements of due process and a fair trial require that a defendant be given a reasonable opportunity to respond to the claims made by the State. That opportunity to respond must include a chance to answer every new subject presented by the state. If the state is given an opportunity to make an opening statement, the defendant should be given an opportunity to make an opening statement during the course of the trial. If the state has an opportunity to present evidence, the defendant must have an opportunity to present contrary evidence. If the state has an opportunity to present argument in summation, the defendant must be given an opportunity to respond to that argument. While the exigencies of trial procedure might permit the prosecutor to divide his summation in such a manner as to open and close the argument, there can be no right of the prosecutor to argue completely new subjects over defendant's objection in the final portion of his summation. In the present case, the prosecutor was permitted to argue that there was widespread corruption in petitioner's municipality, that one of petitioner's witnesses would be "investigated," that character witnesses called by petitioner were not reliable, that certain lesser and included offenses were also proven, and that the trial judge erred in dismissing the bribery count—all in the closing portion of his summation. He had not raised those issues in the opening portion of his summation, and they had not been the subject of discussion by the defendant's counsel in his summation. Despite the vigorous protest by defendant's counsel, the prosecutor was permitted to make such arguments at a time when defendant would have no opportunity to respond. Further, defendant's

counsel was denied any opportunity to rebut those new contentions when the prosecutor had completed those arguments. This procedure denies defendant the right to respond, just as effectively as if defendant had been denied his opportunity to present evidence which rebuts the prosecution's evidence. Cf. *Interstate Commerce Comm'n. v. Louisville & N. R. R.*, 227 U. S. 88 (1913).

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Leader Building,
Cleveland, Ohio,
Counsel for Petitioner.

APPENDIX.

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE SECTION 2919.08.

No person, holding an office of trust or profit by election or appointment, or as agent, servant, or employee of such officer or of a board of such officers, shall be interested in a contract for the purchase of property, supplies, or fire insurance for the use of the county, township, municipal corporation, board of education, or a public institution with which he is connected.

Whoever violates this section shall be imprisoned not less than one nor more than ten years.

OHIO REVISED CODE SECTION 2919.11.

Sections 2919.08 to 2919.10, inclusive, of the Revised Code do not apply to the persons enumerated in said sections who are shareholders of a corporation and own five per cent or less of the stock not exceeding in value the sum of five hundred dollars, whichever limitation of ownership is the lesser in amount, and are not officers or directors thereof, when said corporation has made and entered into any of the contracts and transactions mentioned in said sections, unless there exists a conspiracy to defraud.

If any stockholder desires to avail himself of this section, before entering upon such contract or transaction, such person shall first file with the clerk or fiscal officer of such county, township, municipal corporation, board of education, or public institution an affidavit, under oath, stating his exact status and connection with said corporation.

VERDICT OF THE JURY.

May 11, 1965: To Court:

This day again came the Prosecuting Attorney on behalf of the State, and defendant Albert J. Vlasak was brought into court, and was represented by counsel; also came the jury, duly impaneled and sworn, and the trial proceeded.

And the said jury having heard all the testimony adduced, the arguments of counsel, and the Charge of the Court, retired to their room, in charge of the bailiff, for deliberation.

And now come the jury, conducted into court by the bailiff, and return the following verdict in writing, to-wit: "We, the jury in this case, being duly impaneled and sworn, do find defendant Albert J. Vlasak guilty of conflict of interest as charged."

Thereupon, the Court referred the defendant herein to the Probation Department for pre-sentence report, and he is released on same bond.

M. M. HODDINOTT, J.

(Court of Common Pleas—Criminal Jr. 107-213.)

SENTENCE OF THE COURT OF COMMON PLEAS.

June 24, 1965: To Court:

The defendant herein, Albert J. Vlasak, having been heretofore convicted of conflict of interest as charged in the first count of the indictment, was this day brought into court for sentence, and thereupon the Court inquired of said defendant if he had anything to say why judgment should not be pronounced against him, and he having nothing but what he hath already said:

It is therefore, ordered and adjudged by the court that imposition of sentence in this case is suspended for two years, and defendant Albert J. Vlasak, is ordered placed on probation for the said period of two years under the supervision of Richard McManus, Chief Probation Officer, on condition of good behavior, etc., and on the condition defendant is confined in County Jail for thirty days (said confinement to commence upon the completion of an appeal of this judgment, or upon the expiration of the period in which an appeal could be, but was not, perfected) that he restore $2,000.00 to the Garfield Heights School District, and he is to pay the costs in this case.

M. M. Hoddinott, J.

(Court of Common Pleas—Criminal Jr. 107-696.)

JOURNAL ENTRY OF COURT OF APPEALS.

(Filed November 23, 1966.)

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the court finds no error prejudicial to the appellant and therefore the

judgment of the Court of Common Pleas is affirmed. It is ordered that appellee recover of the appellant its costs herein expended.

It is further ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

(Journal 31 at page 321.)

EXTRACT FROM CHARGE TO THE JURY.

"* * * The only issue for you to decide in this case is this:

Was the defendant, Albert J. Vlasak interested in the May 21, 1963 contract. That is, the second contract for the purchase of some property by the Board of Education of Garfield Heights, Ohio, from Ralph Conte.

To be interested in a contract is to have some pecuniary interest in it, to have a share, portion or part of it or in it. It is to have a personal interest in the proceeds of the contract and to receive part of them. It is to receive personal gain from such a contract as the ultimate expense of the citizens whose interests are entrusted to the public official and which he has the duty to protect.

Now, a person may have an interest in a contract without being a formal party to it. The test is whether a person effectively and eventually receives a personal financial benefit from it. As I have said, the only issue which you are to decide in this case is this:

Was the defendant Albert J. Vlasak interested in the May 21, 1963 contract. That is, the second contract for the purchase of property by the Board of Education of Garfield Heights, Ohio from Ralph Conte." (R. 813, 19).